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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-515

BARBARA A. GREEN, as Administratrix and personal representative of the Estate of Michael Ray Green, deceased; and for the use and benefit of Barbara A. Green, surviving spouse, and Michael Ray Green, II, a minor dependent, and Charles Anthony Laphan, a minor dependent of Michael Green, deceased,

Petitioner,

v.

HARRY J. ROSS and THE TRAVELERS INDEMNITY COMPANY, a foreign corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES V. DOLAN
Walsh, Dolan & Krupnick, P.A.
Attorneys for Petitioner
402 Courthouse Square Bldg.
200 S.E. 6th Street
Fort Lauderdale, Florida 33301

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Barbara A. Green, as Administratrix and personal representative of the Estate of Michael Ray Green, deceased, etc., et al, prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered June 21, 1973.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida reported at 338 F. Supp. 365 and the opinion of the United States Court of Appeals for the Fifth Circuit entered June 21, 1973, not yet officially reported, appear in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit printed in Appendix A hereto was entered on June 21, 1973. This Petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

1. Is a claimant who has invoked the jurisdiction of a federal district court under the general maritime law pursuant to *Moragne* v. *States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) upon a claim that is neither historically nor peculiarly maritime in nature entitled to a trial by jury?

STATEMENT OF THE CASE

On June 12, 1971, Petitioner's husband, Michael Ray Green, deceased, was skin diving about two miles east of Elliott Key in the Atlantic Ocean when he was struck in the head by the propeller of a 17-foot outboard motorboat operated by one Harry J. Ross. Michael Ray Green died shortly thereafter as a result of these injuries.

Barbara A. Green, as Administratrix and personal representative of the Estate of her deceased husband, Michael Ray Green, brought suit against Harry J. Ross and The Travelers Indemnity Company alleging

that her husband's death was caused by the negligence of Harry J. Ross, the operator of the outboard motorboat. Petitioner invoked the admiralty and maritime jurisdiction of the district court to hear her claims arising under federal maritime common law and under the Florida Wrongful Death Act. The claim for wrongful death recovery under general maritime law was founded upon this Court's decision in *Moragne* v. *States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970).

Petitioner's original Complaint contained a demand for trial by jury. Defendants timely filed a motion to strike this demand and said motion was granted by the trial court in a reported opinion at 338 F.Supp. 365 which is set forth in Appendix A hereto.

After a non-jury trial, the district court concluded that the Defendant Harry J. Ross was not negligent in causing the death of Michael Ray Green, deceased. Petitioner appealed the trial court's decision to the United States Court of Appeals for the Fifth Circuit raising the denial of jury trial as error. The Fifth Circuit Court of Appeals affirmed the judgment of the trial court in an opinion dated June 21, 1973, which is set forth in Exhibit A herein.

REASONS FOR GRANTING THE WRIT

Jurisdiction of the federal district court in this cause was invoked under the general maritime law pursuant to *Moragne* v. *States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970). In *Moragne* this Court held that a wrongful death action could be brought in admiralty under the general maritime law. Specifics were not given in the opinion but it was left to the district courts to spell out the elements of this

newly-created "cause of action." Although Petitioner's claim was not historically or peculiarly maritime in nature, she was able to invoke the admiralty jurisdiction of a federal district court pursuant to the *Moragne* decision. She continually requested, but was denied, a trial by jury. Since the reporting of the decision in *Moragne,* this Court has not ruled whether or not a claimant invoking this newly-created jurisdiction of the federal courts is entitled to a trial by jury. Many claimants all over the country have and will continue to file actions in the federal district courts under *Moragne* on claims which are not historically or peculiarly maritime in nature and under circumstances where federal jurisdiction did not heretofore exist. The bench and bar are in need of guidance from this Court as to whether or not these claimants will be entitled to trial by jury.

Petitioner is well aware of the historically rooted principle that an admiralty claimant has no right to jury trial. It has long been held that the Seventh Amendment to the Constitution applies only to actions at "common law," and does not apply to civil admiralty cases. Supposedly, this result was the deliberate choice of the people at the time the nation was founded, the Founding Fathers being of the opinion that "jurisdiction of transactions so peculiar as those of the sea (should) be exercised by judges schooled in the principles and mystery of such transactions." Benedict on Admiralty, Vol. 2, Sec. 224, Page 33 (6th Ed.). But with the expansion of admiralty jurisdiction through the *Moragne* decision, it becomes evident that it is time for a re-evaluation of the historical precedence and the present policy reasons behind the wholesale denial of trial by jury in admiralty actions where such right is

not expressly provided by statute. In the instant case, a man was killed while skin diving when he was run over by a small outboard motorboat. This case had nothing whatever to do with "mysterious transactions of the sea," and therefore the purported historical reason for denying trial by jury was inapplicable.

A recent judicial review of the historical development of admiralty law and jurisdiction has shed some doubt on the historical precedent behind the denial of jury trial in admiralty proceedings. In *Close* v. *Calmar Steamship Corp.*, 44 F.R.D., 398 (E.D.Pa. 1968), the court, after exhaustive research, concluded

> "That there is neither an inherent incompatability between admiralty procedure and jury trial, nor any consistent historical practice excluding juries from admiralty suits." 44 F.R.D. at 403.

Independent admiralty courts were established in England around the middle of the 14th century. The jurisdiction of such courts was strictly limited to cases of piracy. Juries in local seaports had been reluctant to convict their fellow seamen of piracy where a foreign vessel had been plundered, and when convictions did not ensue, the Crown was often required to pay reparation to the nation whose ships had been the victims. Admiralty courts were thus established so that royal officials more sympathetic to the Crown would decide these piracy matters. Vice-admiralty courts were also established in the colonies to aid in the enforcement of the unpopular trade and navigation statutes. The non-jury procedure of these admiralty courts met unfavorable reaction in both England and the colonies. The growth of the admiralty courts in England was effectively curtailed, and at the time of the American

Independence, admiralty jurisdiction in England was limited to prize cases and cases involving contracts made at sea to be performed at sea. All other maritime matters were adjudicated in common-law courts before juries. See *Close, supra,* at 402-404.

Jurisdiction of admiralty courts was not as clearly defined in the United States at the time of Independence as it was in England. Even though at the time of the adoption of the Constitution at least eight of the colonies were using jury trials in admiralty cases, the subject of admiralty jurisdiction does not seem to have been discussed at the Constitutional Convention at all. See *Close, supra,* at 404.

The *Close* case shows us that the historical arguments usually raised in favor of the denial of the right to jury trial in admiralty proceedings lack substance and validity.

It is not the position of the Petitioner in this case that this Court should declare that in *all* admiralty proceedings all parties have a general right to a trial by jury. The Petitioner's position is much more limited. The Petitioner would have this Court rule that where a claimant has invoked the jurisdiction of a federal district court under the general maritime law, such claimant would have the right to a jury trial if that claim is one that is neither historically nor peculiarly maritime in nature. With the ever-expanding admiralty jurisdiction of the federal courts, there is no historical precedent nor present policy reason for continuing the general denial of jury trial on all such claims. Certainly considerations of due process require a re-evaluation of this harsh rule.

Recent cases show that there is nothing sacred in the non-jury aspect of an admiralty proceeding. In *Fitz-*

gerald v. *United States Lines Company*, 374 U.S. 16 (1936), a seaman had brought an action against a shipowner for damages based on negligence and on unseaworthiness as well as an action for maintenance and cure. The lower court dismissed the Jones Act claim but made an award on the maintenance and cure action. This Court held that the seaman was entitled to a jury trial as of right on the maintenance and cure claim, a traditional admiralty remedy, when it was joined with a Jones Act claim providing for jury trial by statute. This case is significant because this Court noted that there was no statutory or constitutional obstacle to providing a jury trial in an admiralty claim and held that under certain circumstances, i.e., the joining of a non-jury trial claim with a claim entitled to jury trial by statute, a claimant would be entitled to a jury trial as a matter of right on a claim that was traditionally admiralty in nature. There is no doubt that this right to jury trial declared in *Fitzgerald* was a "court-created" right. Later interpretations of this case point this out.

> "However, the right to jury trial on admiralty claims joined with a Jones Act claim stems not from the merger of the civil and admiralty rules, but from a court-created right to trial by jury in such cases in the interest of the administration of justice." *Haskins* v. *Point Towing Company*, 395 F.2d. 737 (3rd Cir. 1968).

Later federal cases have expanded the *Fitzgerald* reasoning. In *Peace* v. *Fidalgo Island Packing Co.*, 417 F.2d 371 (9th Cir. 1969), a claimant brought a wrongful death action under the Jones Act on a negligence theory and also on the Death On The High Seas Act for unseaworthiness. Following *Fitzgerald*, the

court held that the claimant was entitled to a jury trial as of right on both of the claims set forth in the complaint. Older federal cases have followed the reasoning that there is no right to jury trial in admiralty unless it is expressly provided by a specific statute. The *Peace* case demonstrates how recent federal decisions have turned this reasoning around. The question in *Peace* was not whether a jury trial should be allowed in any particular admiralty action, but whether that right is expressly prohibited.

The *Fitzgerald* reasoning was further extended in *Bergeria* v. *Marine Carriers, Inc.*, 341 F.Supp. 1153 (E.D.Pa. 1972). In that case, a claimant brought an action under the Jones Act in which he was entitled to a jury trial as of right, pursuant to statute. The shipowner filed a motion to file a supplemental answer and counterclaim seeking recovery of maintenance and cure payments allegedly procured by fraud. The court held that the counter-claimant was entitled to trial by jury as a matter of right on this traditionally maritime claim.

The principle that jury trials are not allowed in admiralty actions as a matter of right was officially discarded by the recent case of *Close* v. *Calmar Steamship Corp.*, *supra*. In that case, suits were brought by several injured longshoremen against the owners of the ships upon which they were injured. The shipowners instituted completely separate actions against the stevedoring firms which employed the longshoremen on an indemnity theory, a traditional "admiralty" action. The shipowners moved to consolidate their indemnity actions with the longshoremen's original suits against them. The stevedoring firms did not oppose consolidation provided that there would be a jury trial on all

issues, and filed a motion in that regard. The shipowners opposed the motion for jury trial.

The court granted the motion for consolidation without much discussion, but considered the motion for jury trial in great depth. The court first noted that the argument that there is a constitutional right to trial of an admiralty case without a jury was specifically rejected by *Fitzgerald, supra.* The court then undertook a thorough examination of the history of admiralty law in America and England, which has been referred to above, and concluded that there was no inherent incompatability between admiralty procedure and jury trial, nor any consistent historical practice excluding juries from admiralty suits. But the exhaustive historical review was set lightly aside by the court, and it would appear that the question actually turned upon whether or not the shipowners' indemnity actions were peculiarly maritime in nature.

> "Finally the historical arguments of the shipowners are of little weight because the shipowners' current indemnity actions are not peculiarly maritime in nature nor have they ever been considered such. The actions technically can be considered admiralty actions because they involve the operational concerns of the shipping industry. . . . Special rules will therefore determine the obligations of the respective parties to the indemnity obligation . . . . But these 'special rules' are not technical niceties beyond the ken of juries." 44 F.R.D. at 405-406 (Citations omitted.)

The court noted that "the jury is the fact-finding tribunal preferred by the federal courts," 44 F.R.D. at 407, and granted the motion for jury trial on all issues of fact. The court was of the view that

> "It would be unrealistic to burden (these claims) with trappings traditionally associated with ad-

> miralty law but no longer supported by viable policy considerations." 44 F.R.D. at 407.

The decision in *Close* turned upon whether the actions for which a jury trial was requested were peculiarly maritime in nature. 44 F.R.D. at 405. That same reasoning should be applied to the instant case. Petitioner's decedent was killed while skin diving by being struck by the prop of a small outbound motorboat. This action is certainly not "peculiarly maritime" in nature nor can it be argued that such an action is historically an admiralty claim; in fact, prior to *Moragne,* the admiralty jurisdiction of the federal district court would not have encompassed Petitioner's claim. (Note that the *Close* decision was decided prior to *Moragne.*)

An argument was made in the *Close* case that any such significant change in trial procedure should be left to Congress, or at least to the Supreme Court. The court rejected this argument pointing out that *Fitzgerald* demonstrated the Supreme Court's willingness to forge new procedure, and noted that it would be necessary for the lower courts to rule upon such issues before the Supreme Court could ever hear them.

The argument that significant changes in trial procedure in the federal courts should not be undertaken by an inferior court obviously found favor with the Fifth Circuit Court of Appeals in the instant case.

> "On appeal, the appellant urges this court to abandon traditional admiralty practice and declare a right to jury trial in cases involving small craft operated by lay mariners on navigable waters since no 'blue water' expertise is required to resolve the issues. We decline to carve out this narrow excep-

tion to well-established procedural rules." Appendix A, Page 7a.

At footnote 6 following that cited portion of the opinion, the Fifth Circuit Court of Appeals indicated that it doubted that it would have the power to undertake such an "alteration" of federal procedure and that the power to grant Petitioner's requested relief would lie solely with this Court.

The Fifth Circuit Court of Appeals in the instant case followed the general rule that an admiralty claimant has no jury trial right unless he sues under a statute which expressly provides it, such as the Jones Act. The *Close* case shows that the historical basis for this rule is doubtful if not non-existent. Furthermore, recent federal cases show that a new approach is being taken to this problem and the question appears to be not whether a right to jury trial is expressly provided for in any particular action, but whether such right is specifically prohibited. The later cases are more logical, since there is no policy consideration in favor of maintaining a rule which has no basis for existence other than very questionable historical precedence. Particularly after *Moragne,* this rule unnecessarily causes injustice to those claimants who are deprived of the right to jury trial for no other reason than the fact that this rule exists. The *Moragne* result demands reconsideration and modification of this rule. As was stated by the Court of Appeals in *Blake* v. *Farrell Lines, Inc.,* 417 F.2d 264 (3d Cir. 1970).

> "The constitutional vesting of admiralty jurisdiction in the district court did not require the perpetuation of all historically characteristic principles, rules, and practices of admiralty, any more than the vesting of these same courts with

equitable powers precluded the subsequent modification of jurisprudence and practice in equity." 47 F.2d at 265.

It is the position of the Plaintiff that the results in *Moragne* demand a judicious reconsideration of precedent and a modification of the rule created by decision law that a claimant is not entitled to jury trial as of right in admiralty. With the expansion of admiralty jurisdiction by the *Moragne* decision, continued adherence to this rule is unjustified by history, reason, or present policy considerations.

CONCLUSION

For the reasons and authorities set forth above, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMES V. DOLAN
Walsh, Dolan & Krupnick, P.A.
Attorneys for Petitioner
402 Courthouse Square Bldg.
200 S.E. 6th Street
Fort Lauderdale, Florida 33301

CONCLUSION

For the reasons and authorities set forth above, it is respectfully prayed that a Writ of Certiorari be granted to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

James V. Dolan
Walsh, Dolan & Krupnick, P.A.
Attorneys for Petitioner
402 Courthouse Square Bldg.
200 S.E. 6th Street
Fort Lauderdale, Florida 33301

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT, S. D. FLORIDA,
MIAMI DIVISION.

Civ. No. 72-144.

BARBARA A. GREEN, as natural guardian, etc., et al.,
Plaintiffs,

v.

HARRY J. ROSS *et al., Defendants.*

March 6, 1972

Order

ATKINS, District Judge.

This cause is before the Court on various motions filed by the defendants. It is a suit by and on behalf of certain relatives of Michael Ray Green to recover damages which allegedly occurred as a result of an incident in which the decedent was run over by a speedboat while skindiving. The Court has considered the memoranda submitted and heard the arguments of counsel. A few general observations seem appropriate as we venture into the relatively uncharted waters to which district courts were given access by the landmark opinion in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

Moragne, of course, for the first time permitted a wrongful death action to be brought in admiralty under the maritime law. In this case, we are initially confronted by two problems which the *Moragne* court anticipated: the proper beneficiaries and the proper elements of damages. The Court there suggested that lower courts might look for guidance to the state wrongful death acts, the Jones Act, the Death on the High Seas Act, or the Longshoremen's and Harbor Workers' Compensation Act.

It is evident that *Moragne* was a remedial decision. Certain plaintiffs, because of the location of their fatal injuries or simply because they died rather than survived, found the doors of the federal court barred to them. The apparent injustice fostered by The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886) has been cured. It also appears that, in the Fifth Circuit, this newly-created cause of action to redress wrongful deaths occurring within state territorial waters is to be liberally fashioned. In Dennis v. Central Gulf Steamship Corp., 323 F.Supp. 943, 947 (E.D. La.1971), Judge Rubin held that "state wrongful death statutes no longer provide the measure of damages for death in coastal waters." While affirming the decision as to specific recoverable elements of damages, the Fifth Circuit noted that, despite the admitted quest for uniformity, "federal courts may look to state law and adopt it as the general maritime law if it is not inimical to the maritime law." Dennis v. Central Gulf Steamship Corp., 453 F.2d 137, 140 (5th Cir. 1972).

These two themes of liberality and uniformity must therefore be reconciled. Defendants argue strenuously that the Death on the High Seas Act (D.O.H.S.A.) must be followed wherever possible. If not, death cases might be routinely plagued by the question of whether or not the wrongful act which caused death occurred within a marine league from shore, with plaintiffs striving to state either a D.O.H.S.A. or a *Moragne* claim, depending on the allowable recovery. This is persuasive only to the extent that *Dennis* does not compel a contrary position, as it does in reference to damages.

I feel that the beneficiaries named in the complaint are all properly included. The only one challenged by defendants is Charles Anthony Laphan, a natural child of the decedent's widow who was supported by the decedent from the date of marriage until his death. Relying upon the dependent relative test of the D.O.H.S.A., I think that

recovery on behalf of the decedent's stepson is permissible here. *Accord,* Petition of United States, 418 F.2d 264, 270 (1st Cir. 1969).

It is appropriate, however, for the claims to be brought by the personal representative for the exclusive benefit of the eligible beneficiaries, as is done under the D.O.H.S.A. The complaint in the case *sub judice* must be amended in that respect to state a claim by the administratrix for the exclusive use and benefit of the decedent's widow, son, and stepson. The claim on behalf of the estate for survival damages, such as decedent's pain and suffering and loss of income between the time of the accident and death, may be included with the above described claims of the personal representative, although such claim would, of course, inure to the benefit of the estate.

Substantively, the complaint is satisfactory in most respects. Plaintiff concedes that, under Branch v. Schumann, 445 F.2d 175 (5th Cir. 1971), defendant Ross cannot be held to the high standard of care created by F.S.A. § 371.52. The board is correctly deemed a "dangerous instrumentality," though, and said reference may remain in the complaint for whatever other purpose it may serve.

The recovery sought for loss of consortium and companionship is, within the meaning of *Dennis, supra,* "inimical to the maritime law," and must therefore be stricken. *See, e. g.* Simpson v. Knutsen, 444 F.2d 523 (9th Cir. 1971); Petition of United States Steel Corp., 436 F.2d 1256, 1279 (6th Cir. 1970). Similarly, the demand for jury trial is inapposite in this case, absent diversity of citizenship. This cause is brought under the admiralty jurisdiction for wrongful death arising from a breach of maritime duties, i. e., negligence. In spelling out the elements of the *Moragne* "cause of action", the courts are not free to create a right to trial by jury where none has existed. Apart from any independent jurisdictional basis (which is not alleged here), an admiralty claimant has no jury

trial right unless he sues under a statute which expressly provides it, such as the Jones Act. Ballard v. Moore-McCormack Lines, Inc., 285 F.Supp. 290, 292 (S.D.N.Y. 1968).

At the hearing, I indicated that the admiralty comparative negligence rule, rather than the absolute contributory negligence bar, would govern this case. *Cf.* Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970); Simpson v. Knutsen, *supra.* I also stated, with the agreement of counsel, that punitive damages were not recoverable except, perhaps, in relation to the claim for survival damages. Thus it was decided that the motion to strike the prayer for punitive damages should be denied without prejudice to defendants' right to renew it at a later date.

Accordingly, it is ordered and adjudged as follows:

1. The motion to dismiss and the motion to require proper pleadings are granted to the extent indicated above of requiring plaintiff to file an amended complaint as described *supra* asserting the claims through the personal representative for the exclusive use and benefit of the named beneficiaries. Leave to amend within ten days from the entry of this order is hereby granted.

2. In all other respects, said motions are denied. Defendants shall answer the amended complaint within ten days from the date of receipt of it.

3. The motion to strike the prayer for damages for loss of companionship and consortium is granted.

4. The motion to strike the demand for trial by jury is granted.

5. In all other respects, the motion to strike is denied.

6. The motion for more definite statement is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3705

(June 21, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

CLARK, Circuit Judge: Barbara Green, as Administratrix and personal representative of the estate of her deceased husband, Michael Ray Green, brought this suit against Harry J. Ross and the Travelers Indemnity Co. Her complaint alleged that Ross' negligence caused the death of her husband, who was struck by the propeller of the defendant's outboard motorboat while skin diving in the Atlantic Ocean.[1] The district court concluded, after a non-jury trial, that the defendant was not negligent. Mrs. Green appeals. We affirm.

The appellant's prime contention is that the court below should have granted her request for a jury trial.[2] Mrs. Green invoked the admiralty and maritime jurisdiction of the district court to hear her claims arising under "federal maritime common law" under the Florida Wrongful Death Act. The claim for wrongful death recovery under general maritime law is founded on the Supreme Court decision in *Moragne* v. *States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 339 (1970). *Moragne* merely removes the bar to recovery by survivors under general federal maritime law in those cases where an injury occurring on navigable waters results in death. *Id.* 398 U.S. at 406, 90 S.Ct. at 1790. Historically, actions for personal injury brought in the federal admiralty jurisdiction under gen-

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[1] The district court found that the accident occurred approximately two miles east of Elliot Key, Dade County, Florida, and therefore with the territorial waters of the State of Florida, *Fla. Stat.* § 6.11.

[2] The opinion of the district court denying the right to a jury trial is reported at 338 F.Supp. 365, 367 (S.D. Fla. 1972).

eral maritime law have not entitled the injured plaintiff to a jury trial, unless he establishes an independent jurisdictional basis for such a trial. See *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 17, 83 S.Ct. 1646, 1648, 10 L.Ed.2d (1963); 9 Wright & Miller, Federal Practice and Procedure § 2315 (1971). We agree with the district court that a *Moragne* survivor-claimant has no greater right to jury trial than his decedent, and thus affirm the denial of a jury trial on appellant's *Moragne* action.

Mrs. Green also alleged a cause of action based on the Florida Wrongful Death Act, Fla. Stat. § 768.01.[3] Prior to *Moragne*, this Act provided a basis for recovery in cases of fatal accidents on Florida's navigable waters resulting from negligence which was enforceable through a libel in rem or in personam brought in the admiralty jurisdiction of the federal district court, *Weeks* v. *Alonzo Cothron, Inc.*, 426 F.2d 674 (5th Cir. 1970); *see Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921); *The Tungus* v. *Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959). We need not decide here whether *Moragne* now preempts such actions in federal court based on state wrongful death statutes,[4] since even if a concurrent cause of action under the Florida Act for wrongful death on navigable waters still exists, Mrs. Green could have invoked

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[3] The Florida Wrongful Death Act applicable to the case *sub judice*, *Fla. Stat.* § 768.01-768.03, has been repealed and replaced by *Fla. Stat.* § 768.16-768.27, effective July 1, 1972.

[4] A number of recent decisions have held that *Moragne* preempts causes of action brought in the federal admiralty jurisdiction under state wrongful death statutes. See, *e.g.*, United States Steel Corp. v. Lamp, 436 F.2d 1256, 1278-79 (6th Cir. 1970), *cert. denied* 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971); Dennis v. Central Gulf Steamship Corp., 323 F.Supp. 943, 946-48 (E.D. La. 1971), *aff'd* 453 F.2d 137 (5th Cir. 1972). *But cf.* Weeks v. Alonzo Cothron, Inc., 466 F.2d 578, 580 (5th Cir. 1972). See generally, Comment, The General Maritime Action from Wrongful Death: Pleading and Practice in the Wake of *Moragne*, 10 Houston L. Rev. 101 (1972); Comment Maritime Wrongful Death After *Moragne:* The Seaman's Legal Lifeboat, 59 Geo. L. J. 1411 (1971).

federal jurisdiction only in admiralty[5] and therefore her suit under the state statute would have been governed by admiralty procedures. *See generally Weeks* v. *Alonzo Cothron, Inc., supra* 426 F.2d 674; *Emerson* v. *Holloway Concrete Products Co.*, 282 F.2d 271 (5th Cir. 1960), *cert. denied* 364 U.S. 941, 81 S.Ct. 459, 5 L.Ed.2d 372 (1961); *Graham* v. *A. Lusi, Ltd.*, 206 F.2d 223 (5th Cir. 1953); *Young* v. *Clyde S.S. Co.*, 294 F. 549 (S.D. Fla. 1923). Thus it is clear that both of the federal jurisdictional bases which Mrs. Green sought to invoke lay exclusively on the admiralty, rather than the civil, side of the district court.

On appeal, the appellant urges this court to abandon traditional admiralty practice and declare a right to jury trial in cases involving small craft operated by lay mariners on navigable waters since no "blue water" expertise is required to resolve the issues. We decline to carve out this narrow exception to well-established procedural rules.[6] Additionally, we note that the appellant bypassed a readily available state court action under the "savings-to-suitors" clause, 28 U.S.C. § 1333(1), and instead elected this traditionally non-jury forum. *Cf. United States Fidelity & Guaranty Co.* v. *Reed Construction Corp.* 149 So.2d 578 (Fla.App. 1963).

Second, the appellant contends that the trial judge erroneously sustained an objection to the introduction of a copy of police report into evidence. The defendant objected on the basis of authenticity, and the appellant then failed to offer any proof whatsoever that the report was in fact

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[5] The appellant lacked any non-admiralty basis for federal jurisdiction, such as diversity of citizenship, *see, e.g.*, United New York & New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed. 2d 541 (1959); or the Jones Act, *see* Fitzgerald v. United States Lines Co., *supra*.

[6] It is highly questionable if this alteration of federal procedure could be effected by opinion of an inferior court. 28 U.S.C. § 2073. *See also* Fitzgerald v. United States Lines Co., *supra*, 374 U.S. at 22, 83 S.Ct. at 1651 (Harlan, J., dissenting).

authentic. The court's ruling was correct. F.R.Civ.P. 44; See also proposed Rules of Evidence for the United States Courts and Magistrates, Rules 901-902 (1972). The court did not reach the question of admissibility of a duplicate.

Third, despite Mrs. Green's objections, the admission of the deposition of the Charles Baggett, an expert for the defendant, was within the trial court's discretion under Local Rule 14(E) of the district court. Although the defense counsel failed to timely present the plaintiff's counsel with a resume of the content of the proposed expert testimony, as required by the local rule, the spirit of the rule had been satisfied. Prior to the trial the plaintiff's counsel knew that the expert would be deposed and knew the content of his testimony. Co-counsel for the plaintiff was present at the deposition. He was told that the deposition would be offered by the defendant, and his early awareness allowed him time to arrange for the deposition of an expert of his own, if he wished to offer one.

Finally, we hold that the findings of the trial judge, giving due regard for the opportunity of the trial court to judge credibility, are not clearly erroneous F.R.Civ.P., Rule 52.

AFFIRMED.